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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
September 13, 2023 Session

**STATE OF TENNESSEE EX REL., NENE GLORIA ANANABA v.
OKEBUGWU SUNJU ANANABA**

**Appeal from the Juvenile Court for Shelby County
No. N1975 Nancy Percer Kessler, Magistrate**

No. W2022-00443-COA-R3-CV

Mother filed a petition alleging civil and criminal contempt against the father of her child due to unpaid child support. After several continuances, including based on Mother's request for an in-person hearing, the juvenile court heard the matter remotely via ZOOM. At the start of the hearing, the trial court denied Mother's request for a continuance for an in-person hearing. The trial court also ruled that it had the authority to choose whether Mother would prosecute her action as civil contempt or criminal contempt. The trial court ruled that Mother's petition would be treated solely as a civil contempt matter, but then refused to punish Father for his past willful failure to pay child support because he had made a purge payment. We vacate the judgment of the trial court and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Vacated and Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which ARNOLD B. GOLDIN, and CARMA DENNIS MCGEE, JJ., joined.

Nene Gloria Ananaba, Nashville, Tennessee, Pro se.

Okebugwu Sunju Ananaba, Nashville, Tennessee, Pro se.¹

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

¹ Appellee Mr. Ananaba filed a pro se notice with this Court that he did not intend to file a brief. He was represented by counsel during the trial court proceedings.

On November 13, 2018, Petitioner/Appellant Nene Gloria Ananaba (“Mother”) filed a petition for scire facias and contempt against Respondent/Appellee Okebugwu Sunju Ananaba (“Father”) in Shelby County Juvenile Court (“the trial court”) alleging that he failed to pay child support as ordered. Mother’s petition asked that Father be punished under, inter alia, Tennessee Code Annotated section 29-9-103. The petition specifically stated that Father was guilty of both civil and criminal contempt and asked that he be found guilty of both. The petition included the following warning:

THIS PETITION PLACES YOU IN JEOPARDY OF BEING FOUND IN CIVIL AND CRIMINAL CONTEMPT OF THIS COURT’S ORDERS. EACH INCIDENT OF CIVIL AND CRIMINAL CONTEMPT CAN RESULT IN YOUR INCARCERATION IN JAIL IN CONTEMPT CHARGES. YOU HAVE THE RIGHTS OF A CRIMINAL DEFENDANT, INCLUDING THE RIGHT AGAINST SELF-INCRIMINATION, THE RIGHT TO COUNSEL AND THE PRESUMPTION OF INNOCENCE.

The case was continued multiple times before being heard by a magistrate on October 18, 2019. The State Title IV-D attorney, Mother, Father, and their respective counsel were present for the hearing. The magistrate’s December 19, 2019 order recounted that the “matter was heard as a criminal contempt petition,” but found that Mother failed to meet her burden of proof. The magistrate therefore dismissed Mother’s petition. Mother, now acting pro se, timely requested rehearing before the juvenile judge.

Juvenile magistrate Nancy Percer Kessler was appointed to serve as special judge by the juvenile judge. The rehearing was then rescheduled on multiple occasions due to the COVID-19 Pandemic or other issues. On September 17, 2021, the trial court entered a continuance order specifically noting that the matter was being continued because Mother “has requested an in-person hearing[.]” On February 10, 2022, however, the trial court issued a notice that a hearing would take place on March 11, 2022 via ZOOM.

Mother, the Title IV-D attorney, Father, and his counsel appeared via ZOOM as scheduled. Mother was at her home in Nashville, Tennessee. In its April 12, 2022 order,² the trial court specifically recounted that the matter had been continued several times, at least once due to Mother’s request that the hearing be held in person. Still, the trial court noted that it denied Mother’s request for a continuance made during the ZOOM hearing. After recounting the proof submitted by the parties, the trial court concluded that it would consider Mother’s petition as a civil contempt matter only, explaining as follows:

Whether a party is found in civil or criminal contempt, is for the court to decide based on the intent of the punishment, whether to compel performance of a court order or to punish the party to vindicate the authority of the law.

² The trial court’s purported final order was later re-entered to include a certificate of service. The April 2022 order and revised order are identical in all material respects.

State ex rel. Groesse v. Sumner, 582 S.W.3d, 241, 251 (Tenn. Ct. App. 1/18/19). In a finding of civil contempt, “the contemnor ‘has the keys to the jail’ and can purge the contempt by complying with the court’s order.” *Id.* “Punishment for criminal contempt is not conditional and must be served, even if the contemnor later complies with the court’s order.” *Id.* (citations omitted). The Court finds that a finding of criminal contempt would serve no purpose at this time. The facts of this case are better suited to a determination of civil contempt.

The trial court further found that Father had willfully failed to pay support as ordered and was therefore “guilty of civil contempt[.]”³ But the trial court then noted that following that period of non-payment, Father had maintained “two years of consistent child support payments.” So the trial court found that Father had purged himself of the contempt by making consistent payments following the hearing before the juvenile magistrate. The trial court did, however, order Father to make payments toward his child support arrearage and a medical judgment. Mother timely appealed the trial court’s ruling to this Court.

II. ISSUES PRESENTED

Mother raises two issues in this appeal which are taken from her brief and reordered:

1. Whether the trial court abused its discretion by electing to conduct a civil contempt hearing when both civil and criminal contempt petitions were properly filed, a notice of rights provided, and Mother clearly elected to proceed with criminal contempt?
2. Whether the trial court erred in insisting that Mother proceed with her hearing via Zoom after it had been continued severally for an in-person hearing, without provision of a means of presenting evidence, after the Supreme Court had not only ordered resumption of in-person hearings, but eliminated the in-court distancing requirement?

III. ANALYSIS

As an initial matter, we note that Mother is proceeding pro se in this appeal, as she did in the rehearing before the trial court. As we have explained,

Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. . . . However, the courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se

³ The trial court’s oral ruling differs from its written order as to whether Father was found in contempt. Still, it is well-settled that the court speaks through its written orders. See *Williams v. City of Burns*, 465 S.W.3d 96, 119 (Tenn. 2015).

litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.

Hessmer v. Hessmer, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003) (internal citations omitted). It is also important to note, however, that Mother is a licensed attorney. Thus, it should not be necessary to afford Mother the same leeway as pro se litigants who have “no legal training and little familiarity with the judicial system.” *Id.*

Keeping these principles in mind, we turn to consider whether the trial court erred in hearing Mother's petition solely as a civil contempt action. The Tennessee Supreme Court has described the contempt power of our courts as follows:

Contempts may be either criminal or civil in nature. Civil contempt occurs when a person refuses or fails to comply with a court order and a contempt action is brought to enforce private rights. If imprisonment is ordered in a civil contempt case, it is remedial and coercive in character, designed to compel the contemnor to comply with the court's order. Compliance will result in immediate release from prison. . . .

Criminal contempts, on the other hand, are intended to preserve the power and vindicate the dignity and authority of the law, and the court as an organ of society. Therefore, sanctions for criminal contempt are generally both punitive and unconditional in nature.

Black v. Blount, 938 S.W.2d 394, 398 (Tenn. 1996) (internal citations omitted). This Court has approved of both civil and criminal contempt in the context of willful non-payment of child support. *See, e.g., State ex rel. Groesse v. Sumner*, 582 S.W.3d 241, 266 (Tenn. Ct. App. 2019) (affirming the trial court's finding that father was in civil contempt for willful failure to pay child support); *Burris v. Burris*, 512 S.W.3d 239, 248 (Tenn. Ct. App. 2016) (affirming the trial court's finding that mother was in criminal contempt for willful failure to pay child support). Moreover, while disfavored, this Court has held that it is not error to try both a criminal contempt action and a civil contempt action simultaneously. *See Duke v. Duke*, No. M2009-02401-COA-R3-CV, 2012 WL 1971144 (Tenn. Ct. App. June 1, 2012) (holding that it was not reversible error to try civil and criminal contempt simultaneously so long as the alleged contemnor received all notice and rights to which he was entitled). And even when it is appropriate to try only one type of contempt, we have generally held that it was for the petitioner to elect which type of contempt to prosecute. *See Freeman v. Freeman*, 147 S.W.3d 234, 244 (Tenn. Ct. App. 2003) (“The mere allegation in Wife's petition seeking both civil and criminal contempt does not prejudice the judicial process and allows the petitioner to elect to proceed on one or the other, providing, of course, that the proper notice is afforded to the respondent.”).

Rather than try Mother's civil and criminal contempt petition simultaneously, or

allow Mother to elect which type of contempt she was proceeding under, the trial court ruled that while Mother had alleged both criminal and civil contempt, it was the court's choice which contempt should be prosecuted, citing *State ex rel. Groesse v. Sumner*, 582 S.W.3d 241 (Tenn. Ct. App. 2019). Respectfully, the trial court misapprehends the holding in that case.

In *Groesse*, the mother filed a petition for contempt against her child's father for failure to pay child support. *Id.* at 246. Eventually, the trial court found Father in contempt, but did not explicitly state whether the contempt was civil or criminal in nature. The trial court did, however, allow the father to make a payment to purge himself of the contempt. *Id.* at 248.

On appeal, the father argued that the contempt finding should be vacated because the trial court did not specify whether the contempt was criminal or civil in nature. *Id.* at 251. We held, however, that when a trial court has found a party in contempt but "not specified the type of contempt," the appellate court can determine the type by looking to the remedy imposed by the trial court. *Id.* Because the trial court in *Groesse* allowed the father to make a purge payment, this Court held that the trial court clearly found Father to be in civil contempt. *Id.* at 252. Thus, the *Groesse* framework allows reviewing courts to determine what type of contempt the trial court imposed by virtue of the punishment the trial court inflicted. *Groesse* does not, however, stand for the proposition that the trial court can take the choice from a petitioner as to which type of contempt to prosecute when either type of contempt has been properly pled. Instead, the general rule that "the plaintiff is the master of his [or her] complaint" must control. *Merolla v. Wilson Cnty.*, No. M2018-00919-COA-R3-CV, 2019 WL 1934829, at *9 n.13 (Tenn. Ct. App. May 1, 2019) (quoting *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 515 (6th Cir. 2003)).

Here, the trial court limited Mother's action to only a civil contempt matter.⁴ The trial court's decision did not rest on any finding that the notice provided by Mother was insufficient for purposes of criminal contempt. Nor did the trial court find that Mother's proof was insufficient to meet the high standard of proof required in a criminal contempt action. Instead, the trial court made its decision based solely on the "purpose" of Mother's action. But the trial court then found that Father had purged the civil contempt due to his later payment of child support. *See Black*, 938 S.W.2d at 398. Purge payments, of course, are only defenses to civil contempt actions; accordingly, Father's later payment would not have absolved him from a criminal contempt charge. *See Ahern v. Ahern*, 15 S.W.3d 73, 79 (Tenn. 2000) ("[W]ith civil contempt, the one in contempt . . . can purge the contempt by complying with the court's order. . . . A party who is in criminal contempt cannot be freed by eventual compliance." (internal citations omitted)). As a result, by limiting Mother

⁴ At the start of the hearing, the trial court acknowledged that Mother had alleged criminal contempt, but stated that it was the court's prerogative "to determine whether its criminal or civil." When Father's counsel made an objection to Father being questioned by the Title IV-D attorney due to the nature of criminal contempt, the trial court specifically ruled that the matter was "a civil contempt[.]"

to civil contempt, the trial court created a ready defense to Mother's allegations that would not have been applicable if Mother had been given the choice to proceed with her criminal contempt allegations. So then, the trial court choosing to remove one facet of Mother's case proved fatal to her ability to obtain any relief. The trial court's decision to treat Mother's petition as solely alleging civil contempt was therefore reversible error. *See* Tenn. R. App. P. 36(b) (stating that final judgments will not be set aside "unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process").

Under the unique circumstances of this case, we conclude that the proper remedy is to vacate the trial court's judgment and remand for a new hearing in which Mother's civil and criminal contempt petitions may be heard simultaneously so long as all procedural safeguards are met, separately, or Mother may elect to proceed with only one type of contempt. Moreover, in light of Mother's consistent request that this hearing be held in person, the new evidentiary hearing on this issue shall take place in person unless otherwise agreed to by the parties. Mother's remaining issue is therefore pretermitted.

IV. CONCLUSION

The judgment of the Shelby County Juvenile Court is vacated, and this matter is remanded for further proceedings consistent with this Opinion. Costs of this appeal are taxed to Appellee, Okebugwu Sunju Ananaba, for which execution may issue if necessary.

s/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE